NO. 84-1044

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PACIFIC GAS AND ELECTRIC COMPANY,
Appellant,

V.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,
Appellee.

On Appeal from the Supreme Court of California

BRIEF OF AMICUS CURIAE, THE LEGAL FOUNDATION OF AMERICA

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INTEREST OF AMICUS CURIAE

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PRELIMINARY STATEMENT

It is expected that PG&E's briefing will thoroughly address the governing case law, including the proper application of the first amendment, the requirement of a compelling state interest, the requirement that regulation conform to the least onerous alternative, the right not to speak, PG&E's right to use its own property, and other issues. Amicus curiae generally agrees with these arguments. However, because amicus curiae wishes to avoid unnecessary duplication, this brief concentrates upon other issues, including policy arguments.

SUMMARY OF ARGUMENT

I.

Content-Based Regulation of Expression. The PUC's approach necessarily regulates speech on the basis of its content. Its decision that TURN's message is "appropriate" and is an "efficient" use of the envelope could only have been reached on the basis of its content. Further, if the Commission is to attain its stated goal of exposing ratepayers to a variety of views, it will be immersed in choosing on the basis of message content between numerous competing groups interested in nuclear power, cogeneration, alternative fuels, rate design, problems of the elderly, small business electric rates, problems of the poor, and other concerns as valid as those favored by TURN. In the process, the Commission will serve as an "editor" or "gatekeeper" of speech, inconsistently with this Court's decisions, and it will discourage speech by PG&E resulting from the use of its own envelope. Speech by utilities is itself valuable, and utilities have contributed significantly to debate about energy and conservation issues. Ironically, the PUC's action ensures that speech from utilities nationwide will be more bland, less responsive to controversy, and less useful than ever before.

II.

"Monopoly" and Regulatory Arguments Insufficient. The "wasted" space or "extra" space rationale does not support the Commission's decision. By exactly the same reasoning, the PUC could grant TURN the right to use empty PG&E offices, unused secretarial time, and advertisements on the sides of PG&E panel trucks. Furthermore, it is meaningless to support the decision by "property" rationales, because PG&E is here denied the use of its own property, and the result is that an asserted property "interest" held by millions of ratepayers as tenants in common is simply given to the use of one entity with which many ratepayers will vehemently disagree. Finally, while PG&E's natural monopoly in gas and electricity justifies regulation of its delivery of those commodities, PG&E does not have a monopoly, or anything approaching a monopoly, upon the media of communication. This "monopoly" rationale comes dangerously close to an endorsement of the regulation of metropolitan newspapers, which many have described as monopolistic. Actually, TURN can reach anyone interested in its message by telephone, mail, or other media, and customers have television, radio, cable, print and other media available to them in abundance. What TURN really seeks is a captive audience that must open the envelope, so that it can have a competitive advantage over other charities in fundraising. This interest is not a legally cognizable one, and the decisions of this Court countermand the asserted monopoly rationale.

I. THE COMMISSION'S APPROACH REGULATES SPEECH ON THE BASIS OF ITS CONTENT.

The Commission has here determined that granting TURN the use of PG&E's billing envelope "would be an appropriate and efficient use of the extra space."[1] In making this decision, the Commission must have evaluated the speech at issue on the

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1 Appendix at A-16.

basis of its content. It could not have decided that TURN's message was "appropriate" or that it would be an "efficient" use of the space without evaluating the content of the message or its effect on the intended audience. [1a]

The Commission has also indicated that it seeks to expose ratepayers to a "variety of views," [2] and it has indicated that it will consider further applicants. Again, it will necessarily decide among applicants on the basis of the content of their messages.

A. *The Commission's Approach Necessarily Requires it to Choose Among a Wide Variety of Competing Groups with Conflicting Points of View.*

PG&E's ratepayers are not a monolith, and they obviously include many whose views are not represented by TURN. For example, there undoubtedly are many who vehemently object to nuclear generation of electricity.[3] Many of these anti-nuclear ratepayers would desire to close the Diablo Canyon nuclear generating station, even though it is already constructed and its closure would increase rates. These individuals' views would conflict sharply with those of groups seeking rates as cheap as possible, presumably including groups such as TURN. Therefore, to accommodate these differing viewpoints, the Commission should logically extend to the Sierra Club, the Friends of the Earth, or the Natural Resources Defense Council the same privilege it has extended to TURN in this case.

If, however, the Commission were to permit anti-nuclear groups to disseminate literature through PG&E's billing envelope, it must logically permit use of the envelope by citizens' groups *supporting* nuclear generation. The Atomic Energy Forum thus might apply for and be granted the use of PG&E's envelope. Nor does the logic of the PUC's position allow it to stop there. The Commission would just as logically need to open the envelope to a wide variety of other groups with competing concerns, among whom it would be required to choose on the basis of message content.

For example, many groups believe that more use of cogeneration will lower rates. Others, however, believe that cogeneration primarily benefits those who are able to set up their own cogeneration facilities while increasing rates for other ratepayers. [4] Accordingly, the Commission's logic means that it should force PG&E to carry literature from groups on various sides of the cogeneration controversy, particularly if it is to provide ratepayers with "exposure to a variety of views."

Even more groups would have antagonistic views on rate design. As the Commission has pointed out, TURN sometimes favors certain groups of consumers at the expense of other groups of consumers in its rate design arguments.[5] Such conflicts are inherent in rate design. Thus elderly ratepayers, perhaps represented by a group such as the American Association

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1a Indeed, the Commission quite clearly seeks to advance one side of the issue. It has favored a group that will argue for reduction of current rates for certain ratepayers, at the expense of the competing concerns enumerated here.

2 Appendix at A-17.

3 Some such opposition is based upon environmental or safety grounds; there is controversy concerning whether nuclear generation will cost less or cost more. Whichever view TURN takes of this issue will thus conflict with the positions of substantial numbers of ratepayers and will affect the rates they pay. See Pacific Gas & Elec. Co. v. California Energy Conservation & Devel. Comm'n, 461 U.S. 190 (1983).

4 The depth of this controversy, which clearly affects daily rates paid by TURN's constituency, can be appreciated by consideration of this Court's decision in FERC v. Mississippi, 456 U.S. 742 (1982). The Court split five to four, after having received dozens of amicus curiae briefs from entities on all sides of the cogeneration issue.

5 Appendix at A-15.

of Retired Persons, should obtain envelope space to advance their concerns. [6] Local chambers of commerce or small business coalitions, which represent business energy users that are disadvantaged by "two-tiered" rates preferring certain consumers and placing the resultant increased costs upon businesses, should be permitted to respond.[7] Furthermore, since the poor as a class are not identical to the elderly and could be disadvantaged by adoption of their agenda, the Welfare Rights Organization should be permitted to oppose the views of TURN (as well as opposing those of the AARP and small businesses).[8]

Groups supporting time-of-day or marginal-cost pricing,[9] as well as groups supporting or opposing "lifeline" rates[10] and

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6 Retired persons, for example, might benefit more from lifeline rates than most other groups, including the poor. See infra note 10.

7 These groups would be "pro-consumer" in that higher electric rates for businesses mean lesser productivity and hence fewer jobs for consumers. Economically, two-tiered rate design is open to criticism as a misallocation of resources. TURN could not be expected to represent this viewpoint and indeed would be likely vigorously to oppose it.

8 See infra note 10.

9 Marginal-cost pricing consists of higher prices at peak periods, when generating capacity is used to the point of inefficiency and electricity costs more than at other times of the day. This rate design would benefit persons who can shift their energy use, such as some homeowners. It would disadvantage businesses, persons dependent on daily air conditioning or heat, and persons seeking jobs.

10 "Lifeline" rate design prices the first units of electricity, up to the amount necessary for a small household, less than greater amounts. Large lifeline rates can be criticized as economically inefficient, because (for example) they would result in subsidy to a wealthy individual living in a condominium. Such rates might be most beneficial to elderly ratepayers. Persons below the poverty line, however, could be given significantly greater assistance by a means-tested program. Many groups of middle-income consumers, businesses, their customers, and persons seeking jobs, might be disadvantaged by certain lifeline rate designs. Again, TURN opposes the interest of many ratepayers no matter which position it takes.

supporting or opposing automatic cost-of-service adjustments,[11] would all have still other agendas, each of which would benefit certain classes of consumers at the expense of others. Indeed, citizens having different views of appropriate use of boiler fuels may have an even greater impact on rates than TURN could hope for; for example, it has been estimated that certain regulatory reforms in the use of natural gas could prevent up to $44 billion in unnecessary capital investment.[12] Citizens agreeing with this view might well regard TURN as detracting from the real issue and sidetracking reforms that would reduce rates. Finally, some consumers would be likely to have the view that TURN's efforts to lower current rates will mortgage the future for slight benefit in the present, and will disproportionately raise future rates.

All of these viewpoints conflict with and have as legitimate a claim to be included as TURN's view. Nor is it fanciful to suppose that such groups will assert their interests in response to the invitation; such diverse organizations as the NAACP[13] and the Friends of the Earth [14] have argued before federal energy agencies. In choosing among such groups, the PUC would in-

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11 Cf. Warren, Regulated Industries' Automatic Cost of Service Adjustment Clauses: Do They Increase or Decrease Cost to the Consumer? 55 NOTRE DAME LAW. 333, 345 (1980).

12 See Foster Nat. Gas Rep. No. 1515, May 2, 1985, at 1 (reporting on efforts to repeal the Powerplant and Industrial Fuel Use Act, accompanied by worst-case estimates of its costing $44 billion and resulting in loss of 1.5 million jobs).

13 NAACP v. FPC, 425 U.S. 662 (1976) (effort to cause FPC to regulate so as to prevent employment discrimination by its regulatees).

14 Just and Reasonable National Rates for Sales of Natural Gas (Opinion 699), 51 FPC 2212, 2288-95 (1974) (effort to use National Environmental Policy Act to force FPC to prepare environmental impact statement for natural gas ceilings rejected as a "complete exercise in futility" that would "so burden this proceeding as to make it impossible to establish just and reasonable rates as required by the Natural Gas Act").

evitably be making the decision to promote or prevent their speech on the basis of its content.[15] Furthermore, if the PUC were to require inclusion of all competing points of view, there would be inadequate room. Thus if groups other than TURN were to respond to the Commission's invitation for applications, and if the Commission were itself to respond favorably, January and February's envelope might be dedicated to pro- and anti-nuclear groups, March and April might be occupied by pro- and anti-cogeneration groups, May might be given to small businesses, June to the AARP, and so on. Indeed, since the potential number of differing points of view is infinite, most would be excluded.

The exclusion would obviously extend to messages that PG&E might otherwise have chosen to distribute. In fact, every message sent by TURN will represent an instance in which the PUC has favored the content chosen by TURN over that chosen by PG&E. The logical extension of the PUC's policy is to require carriage of various "public interest" groups' competing messages during all twelve months of the year, so that PG&E is completely excluded from the use of its own property. There is no reason the Commission cannot accomplish this result if it can do what it has done in the case at bar.

B. The Commission's Approach Places It in the Position of Performing a "Function of Editors"

The Commission's assumption "that the ratepayers will benefit more from exposure to a variety of views" is strikingly similar to the argument considered by this Court in *Miami Herald Publishing Company v. Tornillo*, 418 U.S. 241 (1974), that "government has an obligation to insure that a wide variety of

15 Indeed, the worst possible case would materialize if the variety of applications here hypothesized failed to result. Now that the Commission has favored TURN, the segment of ratepayers that TURN itself favors remains unchecked by any opposing consumer segment whose interests are harmed by TURN's positions.

views reach the public." This Court rejected that argument in *Tornillo*, noting that

> [h]owever much validity may be found in these arguments, at each point the implementation of a remedy such as an enforceable right of access necessarily calls for some mechanism, either governmental or consensual. If it is governmental coercion, this at once brings about a confrontation with the express provisions of the First Amendment.

The essence of the problem, both in *Tornillo* and in the case at bar, is that government is prohibited from intruding in the "function of editors." *Id.* at 254-59. *See also Consolidated Edison Company v. Public Service Commission*, 447 U.S. 530 (1980) ("Government action that regulates speech on the basis of its subject matter 'slip[s] from the neutrality of time, place and circumstance into a concern about content' "); *Columbia Broadcasting System v. Democratic National Committee*, 412 U.S. 94 (1973); *Pittsburgh Press Company v. Human Relations Commission*, 413 U.S. 376, 391 (1973) (decisions do not authorize "any restriction whatever, whether of content or layout," and Court "reaffirm[s] unequivocally the protection afforded to editorial judgment").

For these reasons, the present case is different from *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980). Government need not perform any function as "gatekeeper" or "editor" to require a shopping center to accommodate leaflets, as in *Pruneyard*. Government need not evaluate any leaflet to determine whether it is an "appropriate" or "efficient" use of the shopping center. The PUC's approach, however, would require it to decide on a continuous basis, as editor or gatekeeper, which of various competing uses of PG&E's envelope was most appropriate or efficient in any given month.

C. The Commission's Approach Will Reduce Information Available to Consumers from the Utilities that Serve Them, Because it Will Both Exclude and Discourage Such Speech.

Information from utilities is valuable to consumers. To take but one example, utilities have been in the forefront in advocating and explaining conservation measures.[16] Thus the reason that speech by a utility is protected is not merely that it is of value to the utility, but that it is of value to recipients. *Cf. Consolidated Edison Company v. Public Service Commission, supra; Central Hudson Gas & Electric Corporation v. Public Service Commission*, 447 U.S. 557 (1980).

The avenues of communication available to utilities, however, are limited. Unlike self-styled consumer advocates such as those at TURN or others of Respondents, their personnel are unlikely to be featured guests on television programs, and they are extremely unlikely to be able to obtain charitable contributions to publish their views, as TURN expects to do. Restrictions upon their advertising budgets, which are imposed either directly by regulation or by the marketplace, together with regulatory approaches such as that of the PUC in this case, would reduce the ability of utilities to furnish consumers valuable information concerning how they are serving the marketplace or how consumers can best use the resources available to them.

The editorial intrusion in the present case is all the more likely to discourage such speech because it not only sets up an artificial public forum, but requires carriage of views directly attacking the utility by the utility itself.[17] Such cases as *Wooley*

16 See PG&E Progress, Dec. 1984, at 6, reproduced in Appendix at A-183 (newsletter concerning weatherstripping); Cf. Id. at 3 (window coverings); Id. at 8 (pilotless, energy-efficient appliances). PG&E is typical of local gas and electric utilities in this regard.

17 Nor does the disclaimer required by the Commission solve the problem. No reasonable person would have believed that the car's owner was the author of the motto in Wooley, but the lack of attribution, or lack of necessity of a disclaimer, was not sufficient to support the state's requirement that the objectionable message be carried. Furthermore, the PUC's choice of TURN as the proper entity to be favored with governmentally required use of the billing envelope, reflects the PUC's express finding that TURN's message

v. Maynard, 430 U.S. 705 (1977), and *Columbia Broadcasting System v. Democratic National Committee, supra*, establish what has been called the right not to speak. One rationale for the right not to speak is that, if forced speech is tied to everyday activities or to the exercise of the speaker's own expression, it discourages those activities or speech. *CBS v. DNC, supra.* Throughout the United States, entities such as PG&E will likely be discouraged by the PUC's action here from engaging in speech that is vigorously responsive to current issues, which is the kind of speech that is most likely to be useful to recipients, because they will reasonably fear that their expression will be considered controversial and will invite retaliatory regulation in the form of a requirement that they carry TURN-type inserts. The PUC's action thus assures speech from utilities that will be more bland, timid, and noncontroversial, and hence less useful, than ever before.[18]

II. THE PUC'S DECISION CANNOT BE SUPPORTED BY MONOPOLY OR REGULATORY ARGUMENTS.

A. The Commission's "Wasted Space" and "Property" Rationales Do Not Support Its Decision.

The Commission's "wasted space" or "extra space" reasoning could be equally applied to a wide variety of PG&E property. For example, the side panels of PG&E trucks might be viewed as

is "appropriate" and "efficient." This finding, and the choice of TURN, is itself an endorsement. Finally, the disclaimer does not remove the effect of the order in discouraging PG&E's own expression. See infra note 18 and accompanying text.

18 The disclaimer required by the Commission does not address this concern.

In addition, the possibility that PG&E will be excluded from the use of its own envelope in certain months reduces its speech.

wasted space. Taxicabs and express trucks sometimes carry advertising, and the requirement that one-quarter of PG&E's panel trucks carry a TURN advertisement (or an advertisement from one of the many other groups whose views might conflict with TURN's) would be as logical as the order in question here. Similar reasoning supports the conclusion that vacant utility company offices, such as those not used when employees are on vacation, should be made available to TURN, and utility company secretaries who have any spare time during the day should use that time typing for groups such as TURN. Again, these conclusions are as logical as the one in the present case.

Nor can the "property" reasoning of the PUC support its order. In the first place, property interests are characterized entirely by rights of use and enjoyment,[19] and the PUC's decision creates a fictional property in order to deprive PG&E of the use of the actual property, its envelope. Further, it is meaningless to speak of a property interest in "extra space" that would be theoretically held as a tenancy in common by millions of people with antithetical interests, the ratepayers. The same reasoning could be used to convert every item of shareholders' property to "ratepayers' property." The assignment of that alleged property to a single entity such as TURN, which has interests antagonistic to the uses many persons would make of it, cannot be justified by any traditional view of property.

B. The Utility in Question Does Not Have a Monopoly on the Media of Communications, and its Billing Envelope is Not a Public Forum.

PG&E does not have a monopoly in any sense upon any medium of communication. Its customers have access to many television channels, dozens of cable channels, a variety of metropolitan newspapers, a wide selection of neighborhood news sources, dozens of radio stations, thousands of periodicals, and an infinite variety of communications by mail or telephone. By

19 See infra note 20.

indicating interest in the views of any of a diverse variety of organizations (presumably including TURN), and sometimes for the payment of a modest fee, PG&E's customers can cause themselves to be recipients of the newsletters of groups ranging from Accuracy in Media to the ACLU. Furthermore, any organization can reach PG&E's customers, through solicitation by mail, telephone, or other media. Thus the State's authority to regulate does not, and cannot, find its justification in any defect in the communications market.

In *Perry Education Association v. Perry Local Educators' Association*, 103 S. Ct. 948 (1983), this Court rejected an argument strikingly similar to Respondents' here. A union seeking to organize teachers sued for the right to use the school's internal information distribution system and internal teacher mailboxes. The Court squarely held that the school's internal distribution system was not, by tradition, a public forum; neither was it dedicated as a "limited public forum," as the union argued, or as TURN argues here. Furthermore, the mere fact that the school allowed church groups, the YMCA, or the Cub Scouts to use the internal system did not make it a "limited public forum." Nor did its use by the union's rival, which was an established teacher union. The Court in *Perry* relied heavily upon the existence of a wide variety of media of expression, including the post office, that were available to the petitioner there and are available to TURN here. *Perry* squarely refutes the monopoly contention in the case at bar, as well as the contention that PG&E's use of its own billing envelope makes the envelope a public forum.

The State's authority to regulate, here, derives from PG&E's natural monopoly in the furnishing of gas or electricity. Regulation is a substitute for economic competition. This regulatory authority is not unlimited; it must not be exercised so as to engage in management decisions or interfere with PG&E's legitimate use of its property or exercise of its business.[20] As this

20 Historically, this regulatory authority traces to Munn v. Illinois, 94 U.S. 113 (1877), in which the court said that the grain elevators

Court has said, "While the State may regulate with a view to enforcing reasonable rates and charges, it is not the owner of the property of public utility companies, and it is not clothed with the general power of management incident to ownership. . . ." *Missouri ex rel. Southwestern Bell Telephone Company v. Public Service Commission*, 262 U.S. 276, 289 (1923); *See also* Pond, *Restraining Regulatory Activism: The Proper Scope of Public Utility Regulation*, 35 ADMIN. L. REV. 423 (1983) (discussing *Consolidated Edison* and *Central Hudson* as well as other cases in the context of the asserted "monopoly" justification for regulation).

The same argument concerning monopoly made by the PUC here could actually be better asserted in *Perry Education Association, supra*, or in the case of a major metropolitan newspaper. While PG&E does not have a monopoly (or anything close to one) in the relevant media of expression, a metropolitan newspaper in the United States today is in fact very likely to be precisely such a monopoly. Yet no court would accept the argument that such a newspaper, no matter how firmly established its monopoly might be, could be required to provide

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at issue "stand . . . in the very 'gateway of commerce,' and take toll from all who pass." Id at 132. PG&E stands at the "gateway of commerce" only with respect to gas and electricity. It does not stand at the "gateway of commerce" in expression or communications; in fact, it is itself a user and tollpayer at that gate.

This Court has repeatedly rejected efforts to require even businesses affected with a public interest to allow public use of their property without compensation. E.g., Reagan v. Farmer's Loan & Trust Co., 154 U.S. 362, 410 (1894) ("Is it any less a departure from the obligations of justice to seek to take, not the title, but the use, for the public benefit, at less than its market value?"); Smyth v. Ames, 169 U.S. 466, 546 (1898) ("the corporation may not be required to use its property for the benefit of the public without receiving just compensation"); Bowles v. Willingham, 321 U.S. 503, 517 (1944) (rent controls upheld only on condition that owners not be required "to sell any commodity or offer any accommodation"); NAACP v. FPC, supra; Consolidated Edison Co. v. Pub. Serv. Co., supra; Central Hudson Gas & Elec. Corp. v. Pub. Serv. Co., supra.

its pages for the use of a separate entity selected by a government agency, when the newspaper's own editors would not choose to publish the view of that separate entity and indeed would not even see the pages until they were published. Precisely that result has been reached by the PUC here. *See Miami Herald Publishing Company v. Tornillo, supra.* Such a requirement would be unconstitutional even in the broadcasting context, in which there is justification for regulation to prevent frequency interference. *Columbia Broadcasting System v. Democratic National Committee, supra.* It is even less logical to uphold such a requirement in the case of an entity such as PG&E, that is not in the communications business and has no claim to any communications monopoly.

A part of TURN's argument hinges on the theory that TURN will obtain more reader attention for its monetary solicitations if they are sent with the recipient's electric bill. Thus TURN expects to gain a fundraising advantage over groups that must use direct mail, such as the American Cancer Society, the YMCA, or the Cub Scouts, by using for solicitation purposes an envelope that a captive audience must open and give attention to. TURN's effort to obtain such a competitive advantage in the marketplace of fundraising is not a cognizable legal interest. It consists, ironically, of an effort to obtain the involuntary competitive benefits of the billing envelope for the benefit of TURN, so as to obtain monetary contributions that would otherwise flow to charitable organizations that PG&E's customers might consider more worthy. TURN's argument in this regard is inconsistent with *Perry Education Association, supra.*

CONCLUSION

The decision of the California Public Utilities Commission is inconsistent with the first amendment and should be reversed.

Respectfully submitted,

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